Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

ROBERT E. WRIGHT, SR., PETITIONER

v.

MONTGOMERY COUNTY; MONTGOMERY COUNTY COMMISSIONERS; MARIO MELE; RICHARD BUCKMAN; JOSEPH HOEFFEL; MAILLIE FALCONIERO; GEORGE FALCONERO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Third Circuit decided an important and recurring issue of blanket evidentiary exclusion in employment discrimination cases in a manner that is in conflict with an earlier panel of the Third Circuit and the Eighth Circuit.

2. Whether the fundamental right of a fair trial was denied by the rulings of the court below in handing down 28 orders on the day of trial during the voir dire of the jury which blanketly excluded 27 witnesses from testifying on behalf of the Petitioner and prohibited the introduction of important testimony which supported and corroborated the Petitioner's claim that race was a determinative factor in his termination.

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PETITION FOR WRIT OF CERTIORARI

Robert E. Wright, Sr., the Petitioner, respectfully prays that a writ of certiorari issue to review the opinion and order of the United States Court of Appeals for the Third Circuit entered in this case on January 14, 2004 and February 6, 2004, respectively.

OPINIONS BELOW

The January 14, 2004 opinion and judgment of the United States Court of Appeals for the Third Circuit (Pet. App. 1a hereto) is unreported. The opinion of the United States Court of Appeals for the Third Circuit on the merits, which is sought hereby to be reviewed, affirmed the order of the United States District Court for the Eastern District of Pennsylvania decided on January 23, 2003 and entered on January 24, 2003 and the earlier orders (Pet. App. 28a hereto). The February 6, 2004 order of the United States Court of Appeals for the Third Circuit (Pet. App. 35a hereto) denied Petitioner's timely petition for panel rehearing and Petitioner's suggestion for rehearing en banc.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on January 14, 2004. A timely petition for panel rehearing was denied on February 6, 2004. The jurisdiction of the Supreme Court is invoked Pursuant to 28 U.S.C. section 1254(l) and under Supreme Court Rule 10(a).

RELEVANT PROVISIONS INVOLVED

42 U.S.C. §1981 provides in pertinent part:

Section 1981. Equal rights under the law

(a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, provides in relevant part:

§2000e. Definitions.

For the purposes of this subchapter –

* * * * *

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees ... and any agent of such a person ...

§2000e-2. Unlawful employment practices.

(a) Employer practices
It shall be an unlawful employment practice for an employer -
(1) to ... discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin

STATEMENT

This is an action seeking declaratory and damage relief based upon discrimination in terms and conditions of employment suffered by Petitioner due to his race, for being outspoken at the workplace about his mistreatment due to his race and for his retaliatory discipline and termination by the respondents on the basis of his race and retaliation.

This is an employment discrimination case under 42 U.S.C. §1981 . Petitioner was employed by respondent Montgomery County for 17 years, first through Montgomery County Redevelopment Authority and later at Department of Housing Services. He was eventually promoted to Director of Department of Housing Services of Montgomery County. He is the only Black employee to become a department head in Montgomery County.

The U.S. Department of Housing and Urban Development conducted an investigation of the Department of Housing Services of Montgomery County which concluded in a report that criticized Petitioner and

his department. Petitioner was terminated purportedly due to the report. Petitioner claimed that the reason(s) given for his termination was pretextual and that it was truly rooted in racial animus towards him by respondents and for his being outspoken at the workplace about his mistreatment and retaliatory discipline.

This action was specially listed for trial by the District Court for May 20, 2002, by Order dated April 15, 2002. (Pet. App. 37a hereto) Prior to the start of trial, the parties had filed their various Motions in Limine with the Court in May, 1999 and October, 2001. On May 20, 2002, the parties began voir dire of the jury. The Court handed down 28 orders during the voir dire of the jury which drastically altered the proof that the Court was permitting to be presented to the jury. Among other things, the District Court (Pet. App. 6a hereto) excluded 27 of Petitioner's witnesses which had previously been identified and summarized in his Pretrial Memorandum.

The Third Circuit determined that the District Court "was very diligent in its management of this case" and exercised the appropriate standards of review in this case. The District Court, however, once issued an opinion as if this were a Title VII case; it is 42 U.S.C. §1981 case. During the trial, the District Court once admonished Petitioner's counsel for treating respondent Mario Mele as if he were on trial; he clearly was on trial, he was a named defendant.

The excluded witnesses would have corroborated the racially animus atmosphere in which Black employees had to work. Testimony should have been permitted by those Black employees who had complained to Petitioner about their mistreatment by county officials. The

testimony would have shown the disparated treatment that Petitioner received upon his suspension compared to that of a white employee. Testimony would have shown that white employees who violated the conflict of interest rules of the county received little, if any, disciplinary action. Testimony would have also shown that there was a long standing pattern of sending lesser qualified white job applicants to a department for job openings while more qualified minority job applicants were not.

The District Court prohibited questioning of the respondent witnesses in areas which would have revealed their racial animus and pretextual reasons for terminating petitioner. Respondent Mele should have been further questioned regarding the racial slurs by a county employee and political fund-raiser for the Republican party, against Petitioner and in the resulting disciplinary action. He should have been further questioned about his attendance at an annual luncheon called the "Horse Thieves Society" in which sexual and racial jokes were routinely told. See *Garvey v. Dickinson College*, 763 F.Supp. 799 (MD Pa 1991).

The inconsistency concerning conflict of interest of Respondent Mele goes to his credibility. He had violated county policy but was not disciplined. Additionally, he had permitted a campaign fund-raiser to be sponsored by a major county vendor. The District Court even tried to give the impression to the jury that Respondent Mele was not a defendant in this action and was, in fact, on trial.

Likewise, a chief county assessor was also found to have violated the conflict of interest provisions of the county policy with this same major county vendor, which had the contract to reassess the county, but only received

a minor reprimand.

The District Court prohibited follow-up questioning of Respondent Buckman concerning his involvement in the negotiations of the sale and purchase of the Spring Mountain ski resort in Montgomery County while he was a county commissioner and concluded after he left office, with him taking part or total ownership.

The District Court prohibited questioning of Respondent Hoeffel in many areas. Questioning should have been permitted about his long-term law partner, James Oliver. That would have permitted the exploration of Oliver's relationship with Lillian Ritts, who had filed an affidavit against Petitioner with the county detectives in effort to cause a criminal investigation. Likewise, he was not permitted to question his own conflict of interest as a member of Congress. He was one of the sponsors of Bill 1899, Justice for Victims of Terrorism Act in October-2000. This permitted be frozen Iranian assets to used to pay a $65,000,000.00 judgment that hostage Joseph Cicippio received from Iran. He was represented by James Oliver, his former law partner.

The District Court precluded certain of Petitioner's witnesses from testifying based upon its own determination, without explanation or stating its reasons, that the testimony was irrelevant or cumulative. The jury should have heard their testimony, seen exhibits to be introduced through them, weigh their credibility against other witnesses and determine its value on behalf of Petitioner.

The jury should have heard the witnesses as summarized in the Petitioner's Pretrial Memorandum.

The suspended assistant county solicitor was not escorted from his office by county security as Petitioner was, nor was there any public comment by the county commissioners about his suspension. The son of the Clerk of Courts was rehired after being convicted of theft by the same department in which the theft occurred. A former county personnel director was present when the racial slur was made against Petitioner. He would also testified about the hostile racial atmosphere in the county as it related to the hiring and placement of Black employees. He was instructed by the Chief Clerk not to send qualified minority job applicants to certain departments in the county and send lesser for qualified white applicants.

The head of county security was also prohibited from testifying. He would have testified about the lack of policy or procedure in the removal of an employee upon his suspension. He, however, received direct instruction concerning Petitioner and how he was to be removed from the premises. No such instruction was given to him after the suspension of the assistant county solicitor.

The District Court also precluded the testimony of former County Commissioner Jon Fox. He would have corroborated Petitioner's testimony regarding Respondent Hoeffel's vendetta against him. He would have also contradicted Respondent Mele's testimony concerning the Horse Thieves Luncheon and the racial jokes told there.

The staff that work with Petitioner was blanketly excluded from testifying. Each would have testified as to their particular function and responsibility and Petitioner's supervision of them. They would have

disputed the HUD audit report. They would have testified about his job performance and that it was in compliance with applicable regulations.

Two Black employees were also prohibited from testifying. Both were EEO officers for the county. Both had also complained of their racial mistreatment to Petitioner and others.

The jury was also not permitted to hear the testimony of the County Sheriff, an elected row officer, who made public racial slurs.

Michael Marino, one of the witnesses that Petitioner had wanted to call, among other things, would have testified that he was the District Attorney of Montgomery County and was later a County Commissioner. He would have testified that he called a meeting with the county commissioners and their solicitor regarding an investigation being conducted by the district attorney's office concerning Petitioner. At that meeting, he told them not to interfere with his detectives or any ongoing investigation. As a witness, his credibility and conflicts of interest would be tested by his own conduct. He would have testified that he notified a good friend that a drug search was about to be executed on his home; this was during the time that he was the District Attorney. He also would have testified that during the time he was a County Commissioner, he benefited greatly from the horse running trails on public grounds near his own personal property and horse stable. As County Commissioner, he appointed his personal physician as the director of the department of health services and his personal attorney as the county solicitor. In direct contradiction to county anti-nepotism policy, he had his

good friend, Bruce Castor, County District Attorney, hire his son as a county detective.

This is what the District Court prevented the jury from hearing.

The cumulative prejudicial effect of the numerous errors made by the District Court make it clear that substantial justice was not done and that Petitioner would not receive a fair trial. A different result would probably follow a new trial. The errors or defects relating to the reception or exclusion of evidence relating to witnesses is of such a character sufficiently prejudicial to require or justify the granting of a new trial.

The preclusion of certain witnesses prevented theirs and other witnesses' credibility from being tested before the jury.

REASONS FOR GRANTING THE WRIT

The Third Circuit has decided an important and recurring issue of blanket evidentiary exclusion in employment discrimination cases in a manner that is in conflict with the Eighth Circuit

Although acknowledged in *Quinn v. Consol. Freightways Corp.*, 283 F.3d 572 (3d Cir. 2002) that there is a judicial inhospitality to blanket evidentiary exclusion in discrimination cases, in the Third Circuit and other circuits, this case has now resulted in a conflict of different panels of the Third Circuit and a conflict with the Eighth Circuit. *Estes v. Dick Smith Ford, Inc.*, 856

F.2d 1097, 1103 (8th Cir. 1988); *Callanan v. Runyun*, 75 F.3d 1293 (8th Cir. 1996); *Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287 (8th Cir. 1997). This conflict will result in confusion with the Third Circuit and among the other circuits.

The importance of resolving the conflict and setting a standard for all civil litigants, particularly those in employment discrimination cases, is far-reaching. The decision by the trial judge was wrong. It affected the outcome of the case. Had the jury been presented with all the critical evidence, it would have found that the proffered reason for Petitioner's termination was pretextual. Having had most of the critical witnesses prohibited from testifying and being precluded from developing and delving into various issues, without explanation, Petitioner was denied the opportunity for fair trial.

The District Court improperly undertook the role of passing upon and deciding issues of fact. It is the jury's function to determine the credibility of witnesses, to determine disputed facts, and to draw conclusions and appropriate inferences from doubtful and contradictory premises presented at trial. Where different conclusions and inferences can reasonably be drawn by reasonable minds from the same evidence, the question is one for the jury to decide, not the court. It is this very point, substantial conflict in the testimony, that falls squarely within the province of the jury. The District Court improperly invaded that province.

The District Court is given wide discretion in ruling on admissibility of evidence. However, in excluding testimony the court must look at the prejudice

or surprise in fact of excluding the witnesses who would have testified, the ability of the party to cure the prejudice and the extent to which this would disrupt the orderly and efficient trial of the case. *Meyers v. Pennypack Woods Home Ownership Association*, 559 F.2d 894 (3d Cir. 1977). These are the factors that the Third Circuit looks at in excluding testimony of an expert witness as a discovery sanction. No such sanction was called for in this case. The witnesses listed by Plaintiff had been known to the defendants for years, as well as the court. As in *Quinn, supra*, the blanket exclusion of testimony regarding factors critical to issues in the case is not supported by the record in this case. This clearly caused Petitioner to have proof problems in this employment discrimination case. The effect of the exclusion of witnesses on the morning of trial, made without advance warning to Petitioner, significantly limited the presentation of Petitioner's case and was an abuse of discretion by the trial court.

It is fundamental to our system of jurisprudence that the province of the court is to determine and decide questions of law presented at trial. It is also fundamental that the province of the jury is to decide or determine the facts of the case from the evidence produced. We guard and protect the province of the jury from an invasion by the court. To permit or disregard the province of the jury is to impinge on the right to a fair trial by jury. The District Court, on more than one occasion in pretrial orders, has stated that:

> "... The disputed causal connection and the credibility of the proffered explanation are, of course, issues that a jury must resolve. Wright has produced sufficient evidence for

> a reasonable jury to infer that race was a determinative factor in Plaintiff's termination."

Memorandum and Order of December 18, 1998 and February 25, 2002. It further stated, in its Memorandum and Order of February 25, 2002, that

> "... To discredit the employer's articulated reason, the plaintiff need not produce evidence that necessarily leads to the conclusion that the employer acted for discriminatory reasons, *Sempier v. Johnson & Higgins*, 45 F.3d 724, 728 (3d Cir. 1995), nor produce additional evidence beyond his prima facie case, *Fuentes*, 32 F.3d at 764. The plaintiff must, however, point to 'weaknesses, impossibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons [such] that a reasonable fact finder could rationally find them 'unworthy of credence" and hence infer that the proffered nondiscriminatory reason 'did not actually motivate' the employer's actions. *Simpson v. Kay Jewelers*, 142 F.3d 639, 644 (3d Cir. 1998)."

This is what the proffered testimony and other evidence would have done.

As in any civil case, it is for the jury to determine whether a claim is supported by a preponderance of the evidence. This is so very critical in this case. Where the evidence is contradictory testimony, the jury must decide,

in view of the other facts and circumstances in the case, where the preponderance of evidence lies. When a prima facie case has been made out by the plaintiff, the question whether or not it has been rebutted is for the jury. It is for them to determine what constitutes preponderance of the evidence. It is within their province to reconcile conflicting testimony and say which shall prevail. The delicate balance of the scales is so precarious that it is even more important that the court stay out of that area, so as to error on the side of caution, than to interfere in the name of streamlining justice and moving the case along.

In *Quinn*, at page 578, *supra*, the trial court excluded testimony of a key witness who would have corroborated plaintiff's testimony. The Third Circuit looked at the importance of the excluded testimony. There was no surprise as to the scope of the excluded witnesses' testimony; defendants knew quite well what their testimony in support of Plaintiff would have been. It was recognized that proof is often difficult in discrimination cases and the Third Circuit had adopted a "judicial inhospitability to blanket evidentiary exclusions". It was further "troubled" by the trial judge excluding the witness on the morning of trial, "made without advance warning to plaintiff's attorney." The exclusion was held to be an abuse of discretion. Accordingly, handing down 28 orders during voir dire would likewise be deemed an abuse of discretion and a new trial must be granted.

In *AMTRAK v. Morgan*, 336 U.S. 101 (2002), it was held that events which would have been normally time barred must be presented to the jury to show the existence of past acts and the knowledge of their prior occurrence. These occurrences can be used as background

evidence to support Plaintiff's claim. The entire time period can be considered for the purposes of determining liability. Petitioner was denied this opportunity. His witnesses would have shown the long history of racial animus in the County.

Discretion is clearly and prejudicially abused where the District Court excludes evidence of a critical nature, so that there is no reasonable assurance that the jury would have reached the same conclusion had the evidence been admitted. *First Sec. Bank v. Union Pacific Railroad Co.*, 152 F.3d 877 (8th Cir. 1998).

> **The fundamental right of a fair trial is denied when there is a blanket exclusion of witnesses and issues on the day of trial, without explanation, which would have been supportive and corroborative of a claim that race was a determinative factor in an employment termination case.**

The proper functioning of the federal judiciary is one of the primary responsibilities of the Supreme Court. Rule 10(a) recognizes that a grant of certiorari in cases involving practice and procedure is appropriate. The importance, novelty or difficulty of an issue can best be seen through its far reaching impact on all judicial proceedings. Identifying that a federal appellate decision "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court," demands exercise of this Court's supervisory power. The rulings excluding critical witnesses on the day of trial is such a departure.

Such supervisory power has been exercised in a number of categories. This Court exercised its supervisory authority in the administration of criminal justice in the federal courts, *McNabb vs. United States*, 318 U.S. 322 (1943); the construction of the federal rules of civil procedure, *Hickman vs. Taylor*, 329 U.S. 495 (1947). The exercise of supervisory power is also to accomplish the goal of uniformity of federal procedure. *Hanna v. Plumer*, 380 U.S. 460 (1965). Supervision is now necessary so that an ambush during voir dire is not permitted.

In determining what might demonstrate as a "departure" from the "the usual course of judicial proceedings," does not require that there be a failure to follow recognized rules and procedures. Indeed, this Court, in *Lexecom, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, at 32, (1998), reversed a long-standing practice embodied in a rule of the Judicial Panel of Multi-district Litigation. Direct that fair warning of evidentiary exclusion occur before the day of trial, and especially not during voir dire, is not usurping the trial court of the managing of its own courtroom.

As fundamental as the "gatekeeping" responsibilities of the trial judge regarding expert testimony under Federal Rules of Evidence 702 in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), needed clarification from this Court, so do trial judges need guidance and supervision in the exclusion of witnesses and issues on the day of trial. Sanctions as result of discovery violations are clearly spelled out and known prior to the imposition of the sanction.

Although the conflict is now also within the Third Circuit, such conflicts are usually resolved en banc. An opportunity was presented to the Third Circuit to resolve this conflict. The Third Circuit did not respond or acknowledge that a conflict existed. One of the primary tasks of the circuit court is to reconcile its internal differences. *Wisniewski v. U.S.*, 353 U.S. 901 (1959). It is necessary for this Court to step in and clarify a procedure in which exclusion of witnesses on the day of trial does not result in manifest injustice to the affected party.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court granted the writ of certiorari and the judgment below reversed.

Respectfully submitted,

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No. 03-1536

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ROBERT E. WRIGHT, SR.,
Appellant

v.

MONTGOMERY COUNTY; MONTGOMERY COUNTY COMMISSIONERS; MARIO MELE; RICHARD BUCKMAN; JOSEPH HOEFFEL; MAILLIE FALCONIERO; GEORGE FALCONERO

January 12, 2004,
Submitted Under Third Circuit Lar 34.1(a)
January 14, 2004, Filed

COUNSEL: For Robert E. Wright, Sr., Appellant: Theodore Q. Thompson, Blue Bell, PA. For County of Montgomery, Montgomery Cty Comm, Mario Mele, Richard Buckman, Joseph M. Hoeffel, Appellees: Timothy T. Myers, Elliott, Reihner, Siedzikowski & Egan, Blue Bell, PA. John M. Eliliott, Elliott, Reihner, Siedzikowski & Egan, Blue Bell, PA.

JUDGES: BEFORE: BARRY, SMITH, and GREENBERG, Circuit Judges.

OPINIONBY: Morton I. Greenberg

OPINION: OPINION OF THE COURT

GREENBERG,

Circuit Judge. This matter comes on before the court on the appeal of plaintiff Robert E. Wright, Sr. from an order entered in the district court on January 24, 2003, denying his motion for a new trial following a jury verdict for the appellees in this employment discrimination case. Wright characterizes this action as one "seeking declaratory and damage relief based upon discrimination in terms and conditions of employment [he] suffered . . . due to his race, for being outspoken at the workplace about his mistreatment due to his race and for his retaliatory discipline and termination by the Appellees on the basis of his race and retaliation." Appellant's br. at 2. In particular Wright was terminated as director of the Montgomery County, Pennsylvania, Department of Housing Services.

In his notice of appeal Wright indicates that he is appealing from numerous orders culminating in the order denying his motion for a new trial. In his brief, however, he summarizes the issues as follows:

I. Whether, in an action for retaliatory termination for speaking out against the County's racially discriminatory employment practices, the District Court abused its discretion by effectively precluding and denying [him] an opportunity to present critical evidence at trial by handing out 28 orders on the day of trial during the voir dire of the jury which prohibited 27 of [his] witnesses from testifying and prohibited the introduction of important testimony which supported and corroborated [his] case that race was a determinative factor in his termination.

II. Whether, in an employment discrimination action against a county and its elected county commissioners,

it was clear error for the District Court to dismiss [his] 42 U.S.C. § 1983 action for failure to state a cause of action.

III. Whether the District Court abused its discretion, during pretrial discovery, by permitting discovery abuses by Appellees and sanctioning [him] for requesting a discovery conference.

IV. Whether the District Court abused its discretion by sustaining the jury's verdict and not granting [him] a new trial.

Appellant's br. at 1-2.

He then summarizes his argument as follows:

In an otherwise routine employment discrimination case, the abuse of discretion by the District Court on the morning of trial, by handing down 28 orders on matters which had been outstanding for more than three years, requires that [he] be granted a new trial. The blanket exclusion of 27 of [his] witnesses without explanation or reasoning by the District Court deprived [him of] a fair trial. The excluded witnesses and issues rightfully should have been presented to the jury for them to weigh their credibility and probative value in assessing whether [his] termination . . . was racially based or business justified.

The District Court improperly dismissed the [42 U.S.C.] § 1983 claim by limiting it to a property right claim under [42 U.S.C.] § 1982.

The District Court erred when [it] sanctioned [him] for requesting a discovery conference with the District Court to cap the discovery abuse and wasteful discovery efforts of Montgomery County.

The District Court had full authority to set aside the jury verdict and grant [him] a new trial.Appellant's br. at 6.

The district court had jurisdiction under 28 U.S.C. §§ 1331, 1343(a), and 1367 and we have jurisdiction under 28 U.S.C. § 1291. Wright concedes that we review the various orders from which he appeals on an abuse of discretion basis except that we exercise plenary review over the district court's order granting summary judgment and dismissing his claim under 42 U.S.C. § 1983. We agree. See Evans v. Port Auth. of N.Y. and N.J., 273 F.3d 346, 351 (3d Cir. 2001) (reviewing order denying new trial on an abuse of discretion basis); Northview Motors, Inc. v. Chrysler Motors Corp., 227 F.3d 78, 87 (3d Cir. 2000) (exercising plenary review of order granting judgment); Walden v. Georgia-Pacific Corp., 126 F.3d 506, 516-17 (3d Cir. 1997) (stating that an abuse of discretion standard of review applies to admission of evidence); Newman v. GHS Osteopathic, Inc., 60 F.3d 153, 156 (3d Cir. 1995) (abuse of discretion standard in reviewing order with respect to sanction).

We have reviewed this matter and have examined the district court's comprehensive series of orders and dispositions from which Wright appeals. It is clear to us that the district court was very diligent in its management of this case and, exercising the appropriate standards of review, we find no error in its numerous dispositions. Accordingly, the order of

January 24, 2003, and the earlier orders from which Wright appeals will be affirmed.

/s/ Morton I. Greenberg

Circuit Judge

CIVIL ACTION NO. 96-4597

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT E. WRIGHT, SR.

v.

MONTGOMERY COUNTY, et al.

May 20, 2002 Decided

COUNSEL: For ROBERT E. WRIGHT, SR., PLAINTIFF: THEODORE Q. THOMPSON, AMBLER, PA USA.

For MONTGOMERY COUNTY, MONTGOMERY COUNTY COMMISSIONERS, MARIO MELE, RICHARD BUCKMAN, JOSEPH HOEFFEL, DEFENDANTS: JOHN M. ELLIOTT, ERIC J. BRONSTEIN, TIMOTHY T. MYERS, ELLIOTT, REIHNER, SIEDZIKOWSKY AND EGAN, P.C., BLUE BELL, PA USA.

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For ANN HARTMAN, PIZONKA, MCGRORY, REILLY, BELLO & MCGRORY, P.C., MOVANTS: ROBERT J. REILLEY, JR., PIZONKA, BRADY, REILLEY & BELLO, KING OF PRUSSIA, PA USA.

For UNITED STATES OF AMERICA, MOVANT: MAUREEN BARDEN, U.S. ATTORNEY'S OFFICE, PHILA, PA USA.

JUDGES: HERBERT J. HUTTON, J.

OPINIONBY: HERBERT J. HUTTON

OPINION:
MEMORANDUM AND ORDER

HUTTON, J.

Upon consideration of Plaintiff's Pre-Trial Memorandum (Docket No. 52), Defendants' Supplemental Pre-Trial Memorandum (Docket No. 206), and the Motions in Limine filed by the parties to date, the Court issues the following Memorandum and Order.

I. BACKGROUND

On June 25, 1996, Plaintiff Robert E. Wright, Sr. ("Wright" or "Plaintiff") brought this employment discrimination action against Defendants Montgomery County, Richard S. Buckman, Commissioner of Montgomery County and Joseph M. Hoeffel, III, Commissioner of Montgomery County ("Montgomery County Defendants" or "Defendants"). All that remains of the Plaintiff's complaint is a claim of retaliation for protesting against his own mistreatment for being a member of a racial minority brought under 42 U.S.C. § 1981.

II. DISCUSSION

A. Section 1981 Claim

Section 1981 provides in relevant part that:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. 1981(a) (1994). Although § 1981 has proven effective in battling discrimination, its scope is limited to cases of race discrimination. Saint Francis College v. Al-Khazraji, 481 U.S. 604, 613, 95 L. Ed. 2d 582, 107 S. Ct. 2022 (1987). Thus, these sections may only be invoked when discrimination is alleged against

"identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics." Id. "Congress amended § 1981 in 1991 to allow suits for workplace harassment. See 42 U.S.C. § 1981(b). "Accordingly, claims of a hostile working environment that arise after 1991 are ... actionable under § 1981." Simpson v. Martin, Ryan, Andrada & Lifter, 1997 U.S. Dist. LEXIS 23342, No. CIV.A. 96-4590, 1997 WL 542701, at * 3 (N.D. Ca. Aug. 26, 1997) (citations and footnote omitted). Retaliation claims are also actionable under 1981. Patterson v. Augat Wiring Sys., Inc., 944 F. Supp. 1509, 1519-21 (M.D. Ak. 1996); see Freeman v. Atlantic Ref. & Mktg. Corp., 1994 U.S. Dist. LEXIS 5345, No. CIV.A. 92-7029, 1994 WL 156723, at * 8 (E.D. Pa. Apr. 28, 1994) ("Section 1981's prohibitions against discrimination extend to the same broad range of employment actions and conditions as in Title VII."). n1

1. Retaliation

To make out a prima facie case of retaliation, the Plaintiff must show that: (1) he engaged in protected conduct; (2) his employer took adverse action against him; and (3) there was a causal link between the protected conduct and the adverse action. Kohn v. Lemmon Co., 1998 U.S. Dist. LEXIS 1737, Civ.A. No. 97-3675, 1998 WL 67540, *5 (E.D. Pa. Feb. 18, 1998) (citing Kachmar v. SunGard Data Sys., Inc., 109 F.3d 173, 177 (3d Cir. 1997)). Protected activity consists of opposition to conduct prohibited by Title VII or participation in an investigation of or proceeding regarding such conduct. See 42 U.S.C. § 2000e-3(a); Walden v. Georgia-Pacific Corp., 126 F.3d 506, 513 n.4 (3d Cir. 1997) (grievances about working conditions not

protected activity when they do not concern acts made unlawful by Title VII), cert. denied, 523 U.S. 1074, 118 S. Ct. 1516, 140 L. Ed. 2d 669 (1998); Sumner v. United States Postal Service, 899 F.2d 203, 208 (2d Cir. 1990) (Title VII "prohibits employers from firing workers in retaliation for their opposing discriminatory employment practices"). To establish the requisite causal connection, a plaintiff must proffer evidence "sufficient to raise the inference that [his] protected activity was the likely reason for the adverse action." Zanders v. National R.R. Passenger Corp., 898 F.2d 1127, 1135 (6th Cir. 1990) (citing Cohen v. Fred Meyer, Inc., 686 F.2d 793, 796 (9th Cir. 1982)). Plaintiff must also show that the persons who took the adverse employment action against him knew of the protected activity and acted with a retaliatory motive. Gemmell v. Meese, 655 F. Supp. 577, 582 (E.D. Pa. 1986).

After the plaintiff makes a prima facie showing, a presumption of retaliation arises that shifts the burden of production to the employer to rebut the prima facie case by producing "clear and reasonably specific" evidence that its actions were taken for legitimate, nonretaliatory reasons. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 258, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981). If an employer meets its burden of articulating a non-retaliatory reason, the burden of production shifts back to the plaintiff, who "must have the opportunity to demonstrate that the proffered reason was not ... true." Id. at 256. The plaintiff's burden of production "merges with the ultimate burden of persuading the court that he has been the victim of intentional discrimination." Id. The plaintiff can meet the burden "either directly by persuading the court that a discriminatory reason more likely motivated the

employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Id. (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-05, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973)). If he successfully shows that a retaliatory motive played a motivating part in an adverse employment decision, the employer can nevertheless avoid liability by demonstrating by a preponderance of the evidence that it would still have taken the same action absent retaliatory motive. See Price Waterhouse v. Hopkins, 490 U.S. 228, 252-53, 104 L. Ed. 2d 268, 109 S. Ct. 1775 (1989); Berger v. Iron Workers Reinforced Rodmen, Local 201, 170 F.3d 1111, No. 97-7019, 1999 WL 169431, at *12 (D.C. Cir. Mar. 30, 1999).

B. Immunity

The Defendants are not immune from suit in this § 1981 retaliation claim. First and foremost, the Court is unaware of any court dismissing such a claim based on either absolute immunity or qualified immunity. Second, if this Court were to apply the rationale applied by courts to § 1983 claims to this case, the Court still finds that the Defendants' are not entitled to immunity. No Court has held that a local government is immune from a civil rights suit. The Supreme Court has held that local legislators are absolutely immune from suit under § 1983 for their legislative acts. See Bogan v. Scott-Harris, 523 U.S. 44, 118 S. Ct. 966, 970, 140 L. Ed. 2d 79 (1998). "Whether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it." Id., at 973. In Bogan, Mayor Bogan proposed a budget that froze the salaries of all municipal employees and eliminated one hundred thirty-five city positions. Id., at 969. As part of this

package, Bogan called for the elimination of the Plaintiff's position. Id. Because "the ordinance, in substance, bore all the hallmarks of traditional legislation," the Court granted absolute immunity without determining whether the character of the action was legislative. Id., at 973.

In the present case, absolute immunity does not apply, because the decision to terminate the Plaintiff as Director of Montgomery County Department of Housing Services ("MDHS") was not a legislative act. The Defendant Commissioners' decision to terminate the Plaintiff did not bear any of the hallmarks of traditional legislation. Moreover, the character of the Defendant Commissioners' actions does not entitle them to legislative immunity. This Court has found that a genuine issue exists as to whether the Defendant Commissioners terminated the Plaintiff from his position as Director of Montgomery County Department of Housing Services ("MDHS") because the Plaintiff complained of his mistreatment for being a member of racial minority.

Individual government officials engaged in discretionary functions enjoy qualified immunity from suits when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Sherwood v. Mulvihill, 113 F.3d 396, 398-99 (3d Cir. 1997) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)). The question is whether a reasonable commissioner in the Defendants' position could have believed their conduct was lawful in view of clearly established law and the information they

possessed. See Parkhurst v. Trapp, 77 F.3d 707, 712 (3d Cir. 1996).

In this case, a commissioner who takes retaliatory action against a subordinate for speaking out against his own mistreatment for being a member of a racial minority would be violating a clearly established right of which a reasonable commissioner would be aware. See, e.g., Watters v. City of Philadelphia, 55 F.3d 886, 892-93 (3d Cir. 1995); Bennis v. Gable, 823 F.2d 723, 733 (3d Cir. 1987) (right not to be subjected to adverse employment action in retaliation for engaging in protected First Amendment activity).

C. Punitive Damages

Compensatory damages for mental anguish, as well as punitive damages, are recoverable in certain circumstances under § 1981. United States v. Burke, 504 U.S. 229, 240, 119 L. Ed. 2d 34, 112 S. Ct. 1867 (1992) (citing Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 460, 44 L. Ed. 2d 295, 95 S. Ct. 1716 (1975). To recover punitive damages, a plaintiff must show that a defendant (1) intentionally retaliated against him, and (2) did it "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1).

In Newport v. Fact Concerts, Inc., 453 U.S. 247, 69 L. Ed. 2d 616, 101 S. Ct. 2748 (1981), the Supreme Court held that a municipality (as opposed to an individual defendant) is immune from liability for punitive damages under § 1983. Newport, 453 U.S. at 269-270. A significant part of the Court's reasoning was that deterrence of constitutional violations would be

adequately accomplished by allowing punitive damage awards directly against the responsible individuals. The Court explained:

Moreover, there is available a more effective means of deterrence. By allowing juries and courts to assess punitive damages in appropriate circumstances against the offending official, based on his personal financial resources, the statute [§ 1983] directly advances the public's interest in preventing repeated constitutional deprivations. In our view, this provides sufficient protection against the prospect that a public official may commit recurrent constitutional violations by reason of his office.

Newport, 453 U.S. at 269-270.

Similarly, in Carlson v. Green, 446 U.S. 14, 64 L. Ed. 2d 15, 100 S. Ct. 1468 (1980), the Supreme Court stated that punitive damages would be available in an action against federal officials directly under the Eighth Amendment, partly on the reasoning that since such damages are available under § 1983, it would be anomalous to allow punitive awards against state officers but not federal ones. Id., at 22, and n. 9. See also Adickes v. Kress & Co., 398 U.S. at 233 (Brennan, J., concurring and dissenting); Carey v. Piphus, 435 U.S. 247, 257, n. 11, 55 L. Ed. 2d 252, 98 S. Ct. 1042 (1978); Johnson, 421 U.S. at 460 (punitive damages available under 42 U.S.C. § 1981). Thus, the Court finds that although Montgomery County is immune from punitive damages, the Defendant Commissioners are not afforded such protection.

D. Witnesses

In their Pre-Trial Memoranda, the parties have identified numerous witnesses that they intend to call at trial. Below, the Court finds that these witnesses fit into one of four categories: (1) Relevant; (2) Irrelevant; (3) Cumulative; or (4) Irrelevant and Cumulative. All parties to the action are deemed relevant. Otherwise, those witnesses found to be relevant as to liability or damages are indicated as such. n2 Only witnesses that this Court has found to be relevant as indicated below may be called during trial. All other witnesses are prohibited from being called during this trial absent a renewed proffer acceptable to the Court after all witnesses presently determined by the Court to have relevant testimony have testified.

1. Plaintiff's Witnesses

Regarding the Plaintiff's witnesses as indicated in his Pre-Trial Memorandum, the Court finds as summarized below:

Robert E. Wright, Sr.	Relevant, Plaintiff
Sheilah Wright	Relevant (L)
Mario Mele	Relevant, Defendant
Richard Buckman	Relevant, Defendant
Joseph Hoeffel	Relevant, Defendant
Michael Marino	Irrelevant
Oscar Vance	Relevant (L)
Nick Melair	Relevant (L)
Harry Payne	Relevant (L)
William Hannesberry	Irrelevant
Victor Depollo	Irrelevant
Karen Washington	Irrelevant

Richard Bylar	Irrelevant
Patrick Borden	Irrelevant
Terrence McMullen	Irrelevant
Doug Detwiler	Irrelevant
Stephanie Coleman	Irrelevant
David Wheeler	Irrelevant
John Q. Bingaman	Irrelevant
Marvin Pierce	Irrelevant
George Schlossher	Irrelevant
Charles Nahill	Irrelevant
Jay Moyer	Relevant (L)
Denise Neuschwander	Relevant (L)
Kathy Smith	Irrelevant
Bill Hitchcock	Irrelevant
Lillian Ritts	Irrelevant
Nancy Shearer	Irrelevant
Rena Singer	Relevant (L)
Ken Delanian	Irrelevant
Vincent Cirillo	Irrelevant
Marie Kavanaugh	Irrelevant and Cumulative
Jon Fox	Relevant (L)
Don Polce	Irrelevant and Cumulative
Thomas Stone	Relevant (L)
Joseph Pizonka	Relevant (L)
Harry Massler	Relevant (L)
Jim Jerla	Irrelevant
Grace DelBono	Irrelevant
John Sgarlata	Relevant (L)
Jonh DePaul	Relevant (L)
Frank Lalley	Irrelevant
Dr. Michael Mash	Relevant (D)
Dr. William Rodgers	Relevant (D)
Dr. Patrick McDonough	Relevant (D)
Dr. Harold Byron	Relevant (D)
John Markley	Irrelevant

Jane Markley	Irrelevant
Rev. Dr. Mickarl D. Thomas	Relevant (D)

2. Defendants' Witnesses

Regarding Defendants' witnesses as indicated in their Supplemental Pre-Trial Memorandum, the Court finds as summarized below:

Frank Aiello	Cumulative
Jamesetta Arthur	Cumulative
Salvatore Bello	Relevant (L)
Beneficial National Bank, corporate designee	Cumulative
Patrick Borden	Irrelevant and Cumulative
Michael Brescia	Cumulative
Richard Buckman	Relevant, Defendant
Nora Butler	Irrelevant
Dr. Harold Byron	Irrelevant
CityBank Credit Card Division, corporate designee	Irrelevant and Cumulative
Dr. Gordon Clement	Irrelevant
Coastal Federal Mortgage Co., corporate designee	Cumulative
Stephanie Coleman	Irrelevant and Cumulative
Commerce Bank,	Relevant (L)

corporate designee	
Commonwealth Bank, corporate designee	Cumulative
CoreStates Bank (d/b/a First Union), corporate designee	Cumulative
Lawrence T. Crossan	Relevant (L)
Carrie C. Darden	Irrelevant and Cumulative
Elsie Darden	Irrelevant and Cumulative
General Richard J. DeCarlo	Relevant (L)
John DePaul	Relevant (L)
Douglas Detwiler	Cumulative
Donatucci Kitchens and Representatives thereof	Irrelevant and Cumulative
Thomas E. Doran	Relevant (L)
Charles Dutill	Cumulative

Gloria Echols	Cumulative
Thomas Eichman	Cumulative
George J. Flaconiero	Relevant (L)
First Tuskegee Bank, corporate designee	Cumulative
Dawn Flagg	Irrelevant and Cumulative
Sharon Foley	Irrelevant and Cumulative
Alphonzo Gallo	Relevant (L)
Barbara Gallo	Irrelevant
Richard Gallo	Relevant (L)
Ruth Gant	Irrelevant and Cumulative
G.E. Capital Mortgage Services, corporate designee	Cumulative
John Glennon	Irrelevant and Cumulative
Robert J. Goral	Cumulative
Robert Graft	Irrelevant
Edith Hadrick	Irrelevant and Cumulative
Barbara Harrington	Cumulative
Ann Hartman	Relevant (L)
Lynne Hissner	Cumulative
William Hitchcock	Irrelevant

Joseph Hoeffel	Relevant, Defendant
Jerry Hoff	Irrelevant
Gillis Lee Holmes, Sr.	Cumulative
Lee Holmes, Jr.	Irrelevant and Cumulative
Celeste Jackson	Cumulative
James Jerla	Irrelevant
Bruce A. Kelley	Cumulative
Joseph F. Kuklinski	Cumulative
Curtis C. Lindsey, Jr.	Cumulative
Dr. Michael Mash	Relevant (D)
Dr. Patrick McDonough	Relevant (D)
Terrence McMullen	Cumulative
Robert McNeil	Irrelevant
Nicholas Melair	Relevant (L)
Mario Mele	Relevant, Defendant
Dr. Timothy Michals	Relevant (D)
Philip Montefiore	Relevant (L)
Jay Moyer	Relevant (L)
Matthew Nahrgang, Esq.	Relevant (L)
Denise Neuschwander	Relevant (L)

Robert Neuschwander	Cumulative
Sherry O'Rourke	Cumulative
Ron Paul	Irrelevant
Harry Payne	Relevant (L)
Pennsylvania State Trooper Cory Remp	Irrelevant
Paul Petrolina	Cumulative
Russell Piazza	Irrelevant
Marvin Pierce	Irrelevant
Barbara Pizonka	Irrelevant and Cumulative
Joseph Pizonka	Relevant (L)
PNC Bank, corporate designee	Cumulative
Thomas Raimondi	Relevant (L)
Mark Reichelt	Cumulative
Robert J. Reilley, Jr., Esq.	Cumulative
Patricia Renzi	Relevant (L)
Marianne Rickenbach	Irrelevant
Dr. W.H. Rodgers, III	Relevant (D)
James Rodgers	Cumulative
John M. Ruggiano	Cumulative
Keith Sampson	Cumulative

Tina M. Schimony	Cumulative
Rénee Scott	Cumulative
John Sgarlata	Relevant (L)
Dorethea Skinner	Irrelevant
Robert P. Stevens	Cumulative
Lee Stevenson	Cumulative
Samuel Stretton, Esq.	Cumulative
Oscar Vance	Relevant (L)
James Ward	Cumulative
Dr. G.H. Weiss	Irrelevant
William Wentz	Irrelevant
West Norriton Township Police Sergeant Hallman	Irrelevant
David Wheeler	Cumulative
James Wright	Relevant (L)
Robert E. Wright, Sr.	Relevant, Plaintiff
Sheilah Wright	Relevant (L)
W. Kirk Wyckoff, or other designee of Progress Bank	Relevant (L)
Allison Berl	Relevant (L)
Alicé M. Bucha	Relevant (L)
Armond Byrd	Relevant (L)

Chevy Chase Bank, custodian of records	Relevant (L)
Shirley Christman	Irrelevant
Leanora Ciarletta	Irrelevant
Joseph Conrad	Irrelevant
Ruth S. Damsker	Relevant (L)
Arlene S. Davis	Irrelevant
Debra DeVitis	Irrelevant
Natalie L. DiNolfi	Irrelevant and Cumulative
First Union National Bank, corporate designee	Cumulative
Neil Granese	Irrelevant and Cumulative
William Hanebury	Irrelevant
Johns Eastern Co., Inc., custodial of records	Irrelevant
Karen Kartanowicz	Irrelevant
George Kunin	Irrelevant
Gordan Lawrence	Irrelevant
Madison Bank	Irrelevant
Michael D. Marino	Irrelevant
James W. Matthews	Irrelevant
Cynthia McClanahan	Irrelevant
Detective Sergeant Jeffrey McGee	

James W. McStravick (compliance expert)	Irrelevant
Merchants and Businessman's Mutual Ins. Co,. custodian	Irrelevant
James Monroe	Irrelevant
Barbara J. Morgan	Irrelevant
Sharon M. Olszewski	Irrelevant
Stephen O'Neill	Relevant (L)
Crawford & Co.	Irrelevant
Kathy L. Phifer	Irrelevant
Debbie Toal et al., custodian of records	Irrelevant
Progress Federal Savings Bank, corporate designee	Relevant (L)
Lillian Ritts	Irrelevant
Nan Ryan	Irrelevant
Michael Suray	Irrelevant
Joseph Tinaru	Irrelevant
Karen Trimble	Irrelevant
Robert Trostle	Irrelevant
Diane E. Wood	Irrelevant

An appropriate Order follows.

ORDER

AND NOW, this 20th day of May, 2002, upon consideration of Plaintiff's Pre-Trial Memorandum (Docket No. 52), Defendants' Supplemental Pre-Trial Memorandum (Docket No. 206), and the Motions in Limine filed by the parties as of the date of this Order, IT IS HEREBY ORDERED that all witnesses not found above to be relevant are PROHIBITED from testifying during trial absent a renewed proffer acceptable to the Court after all witnesses presently determined by the Court to have relevant testimony have testified.

BY THE COURT:
HERBERT J. HUTTON, J.

Footnotes

n1 Title VII's § 2000e-2(a)(1) states:

It shall be an unlawful employment practice for an employer - tc fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1).

n2 The Court uses the following abbreviations: (1) "L"

for Liability; and (2) "D" for Damages.

CIVIL ACTION NO. 96-4597

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT E. WRIGHT, SR.

v.

MONTGOMERY COUNTY, et al.

January 23, 2003, Decided

COUNSEL: For Robert E Wright, Sr, PLAINTIFF: Theodore Q Thompson, Ambler, PA USA.

For Montgomery County, Montgomery County Commissioners, Mario Mele, Richard Buckman, Joseph Hoeffel, DEFENDANTS: John M Elliott, Elliott, Reihner, Siedzikowsky and Egan, PC, Blue Bell, PA USA. Eric J Bronstein, Elliott, Reihner, Siedzikowsky and Egan, PC, Blue Bell, PA USA. Timothy T Myers, Elliott, Reihner, Siedzikowsky and Egan, PC, Blue Bell, PA USA.

For Joseph J Pizonka, Barbara Pizonka, MOVANTS: Steven T O'Neill, Wilson, Morrow, Broderick, O'Neill, & Tomkins, LLP, Norristown, PA USA.

For United States of America, MOVANT: Maureen Barden, US Attorney's Office, Philadelphia, PA USA.

JUDGES: HERBERT J. HUTTON, J.

OPINIONBY: HERBERT J. HUTTON

OPINION:
MEMORANDUM AND ORDER

HUTTON, J.

Presently before the Court is Plaintiff Robert E. Wright's Motion for a New Trial (Docket No. 286). For the reasons discussed below, Plaintiff's Motion is denied.

I. BACKGROUND

In this case, Plaintiff, Robert E. Wright, sued Defendants, Montgomery County, Pennsylvania and its County Commissioners, alleging that he was terminated from his position as Director of the Montgomery County Department of Housing Services as a result of employment discrimination. This case was tried before a jury, which ruled in favor of Defendants on June 4, 2002. By way of the instant motion, Plaintiff now seeks a new trial pursuant to Federal Rule of Civil Procedure 59.

II. DISCUSSION

The parameters under which a new trial may be granted are set forth in Fed. R. Civ. P. 59. Rule 59(a) provides, in pertinent part, that:

[a] new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States . . . .

A motion for a new trial may be granted on several grounds, including findings that: (1) the trial court committed prejudicial errors of law; (2) there is newly discovered evidence; and (3) the verdict is against the weight of the evidence. 11 Wright, Miller & Kane, Federal Practice and Procedure Civil 2d, § 2805 (2d Ed. 1995). The decision to grant such a motion rests almost entirely in the discretion of the trial court. American Bearing Co. v. Litton Indus., Inc., 729 F.2d 943, 948 (3d Cir. 1984).

Although not entirely clear from his filings, Plaintiff appears to base his motion on the two grounds. First, he argues that this Court improperly excluded several of his witnesses and other evidence at the trial. Pl.'s Mot. at 1-8. Second, Plaintiff argues that the Court improperly invaded the province of the jury by making credibility determinations about certain witnesses. Pl.'s Supp. Mem. at 7-31. Each of these arguments is discussed in turn below.

A. Excluded Evidence

First, Plaintiff cites numerous instances where the Court excluded witnesses or evidence proffered by him. Plaintiff claims that these rulings "prevented [him] from placing evidence before the jury which would permit them to infer discrimination by the defendants." Pl.'s Mem. at 5. For the reasons discussed below, Plaintiff's arguments must be rejected.

First, by his actions at trial, Plaintiff waived the right to object to any of the witnesses excluded by the Court. Walden v. Georgia-Pacific Corp., 126 F.3d 506, 519 (3d Cir. 1997). As Defendants properly point out, only

definitive rulings on the record regarding the admission or exclusion of evidence may be reviewed for error. See Fed. R. Evid. 103(a). Two elements must exist for an evidentiary ruling to be considered definitive: (1) the party must make an offer of proof regarding the evidence and (2) the Court must make a final ruling deciding whether or not to admit the evidence. Id.; Walden, 126 F.3d at 519.

In this case, however, Plaintiff made no such offer of proof regarding the witnesses that he now claims were improperly excluded. On May 20, 2002, this Court issued a Memorandum and Order providing, in part, that certain of the parties' witnesses were preliminarily excluded on the grounds that the witnesses were either irrelevant, cumulative, or both. See Mem. and Order, May 20, 2002 (Docket No. 251). The Memorandum and Order specifically states that the witnesses were excluded absent a renewed offer acceptable to the Court. Id. At trial, Plaintiff chose not make a renewed offer of proof for any other witnesses listed in the instant motion. Accordingly, he is barred from challenging these exclusions as error. Walden, 126 F.3d at 519 ("Where a district court makes a tentative in limine ruling excluding evidence, the exclusion of that evidence may only be challenged on appeal if the aggrieved party attempts to offer such evidence at trial.") (emphasis in original).

In Walden, the plaintiffs in a Title VII case sought to introduce two statements by the plaintiffs' supervisors. Id. at 516. The trial court held an in limine pretrial evidentiary hearing and issued a tentative ruling that the statements would be excluded. Id. On appeal, the plaintiffs sought to challenge the trial court's exclusion

of the statements. Id. The Third Circuit held that the tentative exclusion of evidence by a trial court could only be challenged on appeal if the aggrieved party attempted to offer such evidence at trial. Id. at 520 (holding that, because plaintiffs failed to make such an offer of proof, trial court's decision was only subject to review for plain error).

Similarly, in this case, the Court issued a tentative ruling excluding some of Plaintiff's evidence. At trial, Plaintiff did not attempt to offer the evidence in question. See June 3, 2002 Tr. at 6. Accordingly, under Walden, Plaintiff waived his right to challenge the Court's ruling on this evidence.

B. Witness Testimony

In his filings, Plaintiff also challenges the manner in which the Court excluded certain witnesses. Pl.'s Supp. Mem. at 7. Specifically, Plaintiff challenges these rulings in two ways. First, he argues that the Court improperly prevented three trial witnesses from testifying on certain allegedly relevant issues. Id. at 13-21. Second, he argues that the Court improperly invaded the province of the jury by altogether excluding the testimony of certain witnesses based on the credibility of those witnesses. Id. at 21-31. For the reasons discussed below, these arguments must also be rejected.

First, Plaintiff claims that the Court improperly prevented three witnesses - Mario Mele, Richard Buckman, and Joseph Hoeffel - from testifying about certain issues at the trial. Id. at 13-21. Initially, this Court notes that the decision to admit or exclude

proffered evidence lies in the discretion of the trial court. Buskirk v. Apollo Metals, 307 F.3d 160, 174 (3d Cir. 2002) (citing Abrams v. Lightolier, Inc., 50 F.3d 1204, 1213 (3d Cir. 1995)). When the trial court applies the proper standard, its decisions are reviewed only for abuse of discretion. Abrams, 50 F.3d at 1213. Under Federal Rules of Evidence 401 and 402, only relevant evidence is admissible. Upon examining Plaintiffs' challenge to the excluded testimony by Mele, Buckman, and Hoeffel, the Court finds that the testimony Plaintiff seeks to offer is irrelevant to the his claim.

Second, Plaintiff contends that this Court improperly precluded several witnesses from testifying at his trial. Pl.'s Supp. Mem. at 21. Plaintiff claims that the Court improperly invaded the province of the jury by basing its ruling on the witnesses' credibility. Id. Curiously, in the same part of his Memorandum, Plaintiff admits that the Court precluded this testimony "based on [the Court's] own determination that the testimony was not relevant or [was] cumulative." Id.

Under the Federal Rules of Evidence 401-403, this precisely describes the Court's role in deciding whether to admit evidence. Federal Rule Evidence 401 defines relevancy. Federal Rule of Evidence 402 states that irrelevant evidence is not admissible. Finally, Federal Rule of Evidence 403 allows the court, in its discretion, to exclude evidence that is prejudicial, confusing, or cumulative.

As Plaintiff himself admits, the Court properly precluded this testimony based on the grounds that is was either cumulative or prejudicial. Accordingly, Plaintiff's motion is denied as to this claim.

III. CONCLUSION

In the instant motion, Plaintiff moves for a new trial on two grounds. First, he argues that the Court improperly excluded certain evidence. Because Plaintiff failed to offer this evidence at trial, this argument is rejected. Second, Plaintiff argues that this Court erred in excluding certain witness testimony and in precluding other witnesses from testifying at all. Because the Court based these decisions on proper grounds, this argument is also rejected. Accordingly, Plaintiff's motion is denied.

An appropriate Order follows.

ORDER

AND NOW, this 23rd day of January, 2003, upon consideration of Plaintiff Robert E. Wright's Motion for a New Trial (Docket No. 286), IT IS HEREBY ORDERED that Plaintiff's Motion is DENIED.

BY THE COURT:
HERBERT J. HUTTON, J.

No. 03-1536

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ROBERT E. WRIGHT, SR.,
Appellant

v.

MONTGOMERY COUNTY; MONTGOMERY COUNTY COMMISSIONERS; MARIO MELE; RICHARD BUCKMAN; JOSEPH HOEFFEL; MAILLIE FALCONIERO; GEORGE FALCONERO

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 96-04597)
District Judge: Honorable Herbert J. Hutton

SUR PETITION FOR REHEARfING

BEFORE: SCIRIA, Chief Judge SLOVITER, NYGAARD, ALITO, ROTH, MCKEE, BARRY, AMBRO, FUENTES, SMITH, CHERTOFF, FISHER, and GREENBERG, Circuit Judges

February 6, 2004

The petition for rehearing filed by appellant, Robert E. Wright, Sr., in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the court in regular active service, and no judge who concurred in the decision having asked for

rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for reheaning is denied. Judge Greenberg's vote is limited to denying rehearing before the original panel.

BY THE COURT:

/s/ Morton I. Greenberg Circuit Judge

DATED: February 6, 2004
tyw/cc: Theodore Q. Thompson, Esq.
John M. Elliott, Esq.
Timothy T. Myers, Esq

CIVIL ACTION NO. 96-4597

UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT E. WRIGHT

v.

MONTGOMERY COUNTY

April 15, 2002

AND NOW, this 15th day of April 2002, it is hereby ORDERED that the above-captioned case is SPECIALLY LISTED for trial to commence on May 20, 2002 at 10:00A.M. in Courtroom 9-A, U.S. Courthouse, 601 Market Street, Philadelphia, PA. Trail is expected to last two weeks.

Trial counsel are: Theodore Q. Thompson, Esq.
John M. Elliott, Esq.
Eric J. Bronstein, Esq.
Timothy T. Myers, Esq

Attest:
STEPHEN J. IANNACONE
Deputy Clerk

cc: Cousel
Thomas Clewley

No. 03-1511

Supreme Court, U.S.
FILED
JUN 7 - 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ROBERT E. WRIGHT, SR.,

Petitioner,

v.

MONTGOMERY COUNTY;
MONTGOMERY COUNTY COMMISSIONERS;
MARIO MELE; RICHARD BUCKMAN; JOSEPH HOEFFEL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Circuit Court's decision to affirm the discrete and specific discretionary evidentiary rulings by the District Court on this record is in conflict with other decisions of the United States Court of Appeals for the Third Circuit or the United States Court of Appeals for the Eighth Circuit.

2. Whether the Plaintiff was denied a fair trial by the discretionary and preliminary rulings of the District Court and after he waived his right to proffer additional witnesses.

LIST OF ALL PARTIES

Petitioner is Plaintiff Robert E. Wright, Sr. Respondents are Defendants Montgomery County and former Montgomery County Commissioners, Mario Mele, Richard Buckman and Joseph Hoeffel. Montgomery County is a political subdivision of the Commonwealth of Pennsylvania.

Although listed in the caption, Maillie Falconiero & Company, LLP and George Falconero are not parties, and appear erroneously on the dockets in the District Court and the Circuit Court as a result of their moving to quash a third-party subpoena.

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STATEMENT OF THE CASE

Petitioner/Plaintiff/Appellant Robert E. Wright, Sr. alleged that he was terminated as Director of the Montgomery County Department of Housing Services ("MDHS") in retaliation for protesting against mistreatment for being African-American. (App. 2a, 8a.)[1]

Plaintiff was one of three MDHS employees terminated after the U.S. Department of Housing and Urban Development, Office of Inspector General ("HUD") audited the MDHS. All three MDHS employees were named in the HUD Audit Report (D-1) as engaging in conflicts of interest and other serious misconduct. The other two terminated employees are male Caucasians, who were supervised by Plaintiff. Of the three, Plaintiff's misconduct was by far the most egregious.

The HUD Audit Report detailed seven chapters of findings, any ***one*** of which justified Plaintiff's termination: (1) there were no assurances that contractors completed rehabilitation work in accordance with specifications; (2) procedures were inadequate to prevent conflicts of interest; (3) there were no assurances that rental rehabilitation costs were fully supported and reasonable; (4) procedures were needed to be improved for purchasing supplies and services; (5) improvements were needed to ensure rental rehabilitation benefits to low-to-moderate-income households; (6) improved systems for scheduling and conducting annual inspections of rental units were needed; and (7) contractors' insurance coverage needed to be verified. (D-1.)

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1. Petitioner's Brief does not contain citations to the record for factual statements, and his Appendix does not include the extensive trial record from this jury trial in which forty-six (46) defense exhibits ("D-__") were admitted into evidence. Therefore, Respondents' factual citations are restricted to the trial record because of the absence of the factual record in Petitioner's Appendix.

The HUD Report also identified procedural deficiencies in the MDHS that included: (1) $138,347 in work was either not done at all or not done properly; (2) substandard housing conditions were not corrected and properties did not meet federal housing quality standards; (3) proper procedures were not followed to award bid contracts; (4) contractors had inadequate insurance coverage; (5) $234,000 in supplies and services could not be assured to have been paid at the lowest available prices; (6) necessary documentation for verifying affordable rents and qualified tenants were not obtained and tenants were overcharged; (7) required property inspections were not performed and rental units were not maintained in a decent, safe and sanitary condition; and (8) proper and required paperwork, including change orders, was never filled out or submitted. *Id.*

Plaintiff obstructed the HUD Audit, lied to the HUD Auditors and Defendants, and obstructed Montgomery County's timely and informed response to the HUD Audit. The Defendant Commissioners testified at trial that this misconduct jeopardized tens of millions of dollars in federal funding for Montgomery County's low income citizens.

The District Court provided Plaintiff with a full and fair opportunity to present his case to the jury. The Circuit Court "reviewed this matter and . . . examined the district court's comprehensive series of orders and dispositions" and concluded that "it is very clear to us that the district court was very diligent in its management of this case and, exercising the appropriate standards of review, we find no error in its numerous dispositions." (4a.)

The trial record overwhelmingly confirms that Defendants' reasons for termination were not pretextual, and that they acted rationally and reasonably in terminating Plaintiff, and the two male Caucasian employees, whom he

admittedly supervised, after the HUD Audit detailed his numerous conflicts of interest, mismanagement and misconduct in the federally funded HUD/MDHS housing programs, in blatant violation of Montgomery County, State, and HUD Regulations. Plaintiff was suspended, and then terminated by the County's Salary Board, consisting of the three Defendant Commissioners and the non-party Controller, based on HUD's findings and the County's independent internal investigation, which were confirmed in two days of Plaintiff's Grievance Hearings.[2]

HUD specifically named Plaintiff as personally engaging in numerous instances of undisclosed conflicts of interest over at least a six year period from 1989 through 1995, when he controlled these HUD funded programs, in violation of HUD Regulations, State Ethics laws, and the County Handbook. (D-1 at p. 15.)

Plaintiff's testimony at trial showed that his conflicts of interest began as early as 1985, when he secretly received a ***free*** 50% partnership in a real estate company, without making any capital contribution, in violation of State and County ethics rules. From July, 1985 through the time of his suspension in March, 1996, Plaintiff and his secret

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2. The County's internal investigation revealed, *inter alia*, that Plaintiff mistreated and spoke abusively to one of the elderly African-American women whose complaints about the shoddy work done on her home by a conflicted contractor sparked the HUD Audit. It revealed that Plaintiff routinely conducted private business and personal recreation during work hours. It found that Plaintiff was often out of state on personal matters after he fraudulently signed into the MDHS office log, and thus misrepresented that he was at work on government time. Plaintiff also purchased an appliance from a HUD vendor, billed it to the MDHS, and only belatedly paid for it (while still illegally avoiding Pennsylvania sales tax) after the vendor dunned the County for almost a year, and the Controller's Office tracked the invoice down to a personal property owned by Plaintiff.

partnership obtained several properties and then had HUD contractors perform work on them in blatant conflicts of interest, and in violation of the Montgomery County Handbook, the HUD Standards of Conduct, and the State Ethics Act. Plaintiff corruptly awarded public contracts to these HUD contractors, while they were providing personal work and supplies to him. Then, in blatant conflicts of interest, Plaintiff, and the two other terminated MDHS employees, "inspected" these corrupted contractors' work, and routinely authorized public payments to them, while receiving personal "discounts" or "preferred pricing."

Plaintiff was terminated because of the findings of the HUD Report, and the additional misconduct discovered by Defendants when they investigated the HUD findings. There was no racial motivation behind his termination. Defendants acted reasonably, prudently and in the public interest in responding to HUD's concerns. If Defendants had ignored the HUD Report, they would have violated their fiduciary duties to the public and taxpayers of Montgomery County; jeopardized millions of dollars in HUD housing subsidies; and compromised the integrity of MDHS and its federally funded housing programs to the great detriment of Montgomery County's low income citizens.

Plaintiff was an at-will employee. He was also a public official charged with fiduciary duties to Montgomery County, the public and the citizens that he was employed to protect and service. He abused his office to selfishly serve his private economic interests. Plaintiff was not terminated for racial reasons, but for his egregious conflicts of interests, mismanagement, nondisclosures and misconduct.

SUMMARY OF THE ARGUMENT

Plaintiff is not entitled to a new trial. The discrete areas of Defendants' testimony that were limited by the trial judge were not relevant to Plaintiff's claim, and any probative value was outweighed by their prejudicial effect. He was properly precluded from calling three witnesses at trial, for whom Plaintiff did not proffer any relevant or admissible evidence.

Plaintiff waived any objection to the District Court's pre-trial evidentiary rulings by failing to comply with the May 20, 2002 Order requiring proffers of evidence at trial. Additionally, even if he had not waived it, he was not prejudiced by his own lack of proffer, or the exclusion of any evidence. In contrast, the prejudicial value of the evidence identified by Plaintiff after the trial would have mandated its preclusion if it had been proffered.

REASONS FOR DENYING THE PETITION

1. There Is No Conflict Of Different Panels Within The Third Circuit Or Between The Third Circuit And The Eighth Circuit.

In this case, the United States Court of Appeals for the Third Circuit "reviewed" and "examined" the record of this case and held that there was no error in the District Court's numerous discretionary dispositions. (App. 4a.) This holding is not in conflict with any decision of a different panel of *any* Circuit Court.

Petitioner cites to *Quinn v. Consolidated Freightways Corporation of Delaware*, 283 F.3d 572 (3d Cir. 2002). In *Quinn*, the Circuit Court reversed a *sanctions* order and held:

> The trial court's blanket exclusion of Passion's testimony regarding a hotel incident involving Kudrick and Quinn is not supported *by this record.*

Quinn, 283 F.3d at 578 (emphasis added).

The holding in *Quinn* is not in conflict with the holding by the Circuit Court in this case that the District Court did not commit an abuse of discretion in its evidentiary rulings *based on this record.* (App. 4a.) In this case, the District Court did not enter any sanctions order that barred any evidence. It made specific evidentiary rulings and did not make any "blanket" exclusions. Significantly, most of the purported evidence which Petitioner argues was excluded was, in fact, never excluded. Petitioner simply failed to proffer it.

Similarly, the cases cited by Petitioner from the United States Court of Appeals for the Eighth Circuit are not in conflict with the Circuit Court decision in this case. In *Callanan v. Runyon*, 75 F.3d 1293, 1298 (8th Cir. 1996), the Circuit Court held that the District Court did *not* abuse its discretion in excluding evidence. In *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1103 (8th Cir. 1988), the Circuit Court held that the District Court erred in determining blanket exclusions of evidence "*before trial began.*" Here, the District Court *preliminarily* ruled on evidence and specifically directed the Plaintiff to proffer the evidence at trial, which he failed to do.[3]

Prior to trial, Plaintiff repeatedly changed his witness list by informal correspondence that reached eight-eight (88) trial witnesses. Defendants continually requested Plaintiff to file a final Pre-Trial Memorandum consistent with the District Court's Summary Judgment Orders, which dismissed seven of the eight counts of the Complaint, and several civil rights claims in the remaining Count I. However, Plaintiff refused to do so. Therefore, on April 20, 2002, Defendants

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3. In *Jenson v. Eleventh Taconite Co.*, 130 F.3d 1287, 1295-97 (8th Cir. 1997), the Circuit Court held that a Special Master erred in excluding six medical experts at the trial based upon personal and erroneous preconceived notions relating to psychiatric proof. This was not an issue in this case, and Plaintiff never even retained an expert.

filed a Supplemental Pre-Trial Memorandum and were required to list numerous witnesses to refute Plaintiff's 88 witnesses. Accordingly, the District Court properly exercised its discretion in preliminarily ruling on the parties' numerous witnesses.

The District Court's May 20, 2002 Memorandum and Order (Dkt.#251) ***preliminarily*** excluded certain of the parties' potential witnesses identified in their respective Pre-Trial Memoranda. (App. 15a, 30a-31a.) It did not make a "definitive ruling" precluding any witnesses. Rather, the Court ***expressly ordered the parties to make an offer of proof at trial*** if they determined any of the witnesses to be necessary:

> In their Pre-Trial Memoranda, the parties have identified numerous witnesses that they intend to call at trial. . . . Only witnesses that this Court has found to be relevant as indicated below may be called during trial. All other witnesses are prohibited from being called during this trial *absent a renewed proffer acceptable to the Court*. . . .

(App. 15a; emphasis added)

On the morning of the second day of trial, during Plaintiff's *direct* testimony, the District Court further explained to Plaintiff's counsel that he could proffer any additional witnesses:

> THE COURT: The order says, hereby ordered that all witnesses not found above to be relevant are prohibited from testifying during trial, ***absent renewed proffer acceptable to the Court*** after all witnesses presently determined by the Court have made relevant testimony, have testified.

Now, you've only had one witness. Aren't you being rather precipitous?

MR. THOMPSON: I'm not trying to be precipitous, it's just that for instance a number of the witnesses that are deemed irrelevant would have been office staff of Mr. Wright, the McMullans, the Bordens, et cetera. Even though Mr. Wright on his own can testify as to the runnings et cetera of the office, and it's not that they would be cumulative each had little different aspects which would be —

THE COURT: Well, there's always rebuttal as you know in a trial procedure. If after cross-examination there's some query that has been raised as to the credibility of Mr. Wright's testimony on a certain area about a HUD regulation or what have you, if you don't have the written regulating [sic] you might want to have somebody come — ***proffer to me that you need someone*** who had direct line responsibility come in and testify. . . .

* * *

THE COURT: Well, now, you're getting into the counter claim. See you have to prove your case first.

MR. THOMPSON: Okay.

THE COURT: Your discrimination case. I'm trying to keep you learned counsel on the same page.

> You have got to come up with all of the basic reasons. Then the burden shifts. Mr. Elliott has to come back and he has to challenge that and then after we get through all of that and then that parts done, then Mr. Elliott puts in his case. Which has all other kinds of concerns in it, that, you know, Mr. Elliott was trying to fast forward to yesterday.
>
> Then he can bring Mr. Wright back on the stand as on cross, and you can go into all of those areas that are relevant to your claims at that time. At which time then you can challenge whatever witnesses Mr. Marino ***whoever else you can profit [sic proffer] me again*** and see who's relevant for those determinations.

5/22/02 Tr. at pp. 59-62 (emphasis added).

After two weeks of trial testimony, in response to a specific request by the Court at trial for such proffers, Plaintiff chose not to make any, and waived any claim of error in the preliminary discretionary rulings he challenges on appeal:

> THE COURT: What other witness would you like to proffer then, Mr. Thompson, other than Dr. Mash.
>
> MR. THOMPSON: I believe that would be the plaintiff's case, Your Honor.
>
> MR. THOMPSON: We rest.

6/3/02 Tr. at p. 6.[4]

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4. During the trial, Plaintiff only proffered three witnesses that the Court excluded, two of whom are discussed in Plaintiff's Petition and therefore, *infra*, in this Opposition Brief: Plaintiff's treating physician, Dr. Mash and a former Montgomery County Commissioner, Jon Fox.

Plaintiff failed to make such proffers and failed to call them as witnesses. (App. 15a, 30a-31a.) In fact, Plaintiff failed to even serve many of the witnesses with trial subpoenas, thereby demonstrating that he never intended on calling them at trial.[5] Plaintiff waived any claim of error by failing to make an offer of proof at trial with respect to any of the irrelevant, cumulative witness testimony he now belatedly claims was erroneously excluded. FED. R. EVID. 103(a)(2). *See also Walden v. Georgia-Pacific Corp.*, 126 F.3d 506, 517 (3d Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998); *Williams v. Drake*, 146 F.3d 44, 49 (1st Cir. 1998); *Holst v. Countryside Enters., Inc.*, 14 F.3d 1319, 1323 (8th Cir. 1994).

In *Walden*, an employment discrimination case, the district court made a tentative pre-trial ruling to exclude certain witness statements on the grounds of relevance and indicated that these rulings may be reconsidered in the context of the trial. *Walden*, 126 F.3d at 517. Nonetheless, the plaintiff failed to make an offer of proof at trial. The Third Circuit Court of Appeals stated that:

> . . . a party is only excused from an offer of proof at trial if the district court's in limine ruling was definitive with no suggestion that the court would reconsider the ruling. The district court clearly stated at the outset of the hearing that its rulings were tentative and that it would reconsider those rulings at trial, and the court never retreated from that position.

Id. at 520.

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5. Pursuant to Local Rule 45.1 of the United States District Court for the Eastern District of Pennsylvania, Plaintiff was required to serve trial subpoenas at least five (5) days prior to trial, or by May 15, 2002, or take their trial depositions prior to trial.

The Eighth Circuit Court of Appeals, described by Petitioner as being in conflict, is in accord with this holding. *See Christinson v. Big Stone County Co-Op*, 13 F.3d 1178, 1180-1181 (8th Cir. 1994).

Plaintiff did not make an offer of proof with respect to the witnesses he now claims were erroneously excluded. Accordingly, he waived his right to claim error concerning the preliminary pre-trial exclusion of Plaintiff's witnesses. *Walden*, 126 F.3d at 520.

2. Plaintiff Was Not Prejudiced By His Own Waiver, His Own Lack Of Proffer, Or The Court's Exclusion Of Any Evidence.

Even assuming *arguendo* that the District Court's *in limine* rulings were in error, which they were not, and even assuming *arguendo* that Plaintiff did not waive any claim of error by failing to make proffers at trial, which he did, Plaintiff has no legitimate claim of substantial injustice or prejudicial error.

Whether to exclude proffered evidence lies within the sound discretion of the Court. *Link v. Mercedes-Benz of North America*, 788 F.2d 918, 921-22 (3d Cir. 1986). Federal Rules of Evidence 401 and 402 require that, for evidence to be admissible, it must be relevant. Additionally, Federal Rule of Evidence 403 requires its probative value to outweigh any danger of unfair prejudice or jury confusion. *Coleman v. Home Depot*, 306 F.3d 1333, 1347 (3d Cir. 2002).

Plaintiff's claim was under 42 U.S.C. § 1981 for retaliatory discharge. To establish a case of retaliation, Plaintiff had to show that: (1) he engaged in protected conduct; (2) his employer took an adverse action against him; and (3) there was a causal link between the protected conduct

and the adverse action. *See Walden*, 126 F.3d at 512 n.4; *EEOC v. L.B. Foster Co.*, 123 F.3d 746, 754-55 (3d Cir. 1997), *cert. denied*, 522 U.S. 1147 (1998); *Barber v. CSX Distribution Services*, 68 F.3d 694, 702 (3d Cir. 1995).[6]

To establish the requisite causal connection, Plaintiff had to show that the persons who took the adverse action against him *knew* of the alleged protected activity and acted with a retaliatory motive. *Jones v. School District of Phila.*, 198 F.3d 403, 415 (3d Cir. 1999). There must be evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action. *Id.*; *Longstreet v. Holy Spirit Hosp.*, 67 Fed. Appx. 123, 2003 WL 21205881, *4 (3d Cir. May 23, 2003).

"It is not enough to *dis* believe the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination." *Fuentes v. Perskie*, 32 F.3d 759, 763 (3d Cir. 1994) (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 519 (1993) (emphasis in original)). "To prevail at trial, the plaintiff must prove . . . that but for the protected [activity], the plaintiff would [not have been terminated]." *Id.* at 764. He "must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies or contradictions in the employer's proffered legitimate reasons for its sanction that a reasonable factfinder *could* rationally find them "unworthy of credence." *Id.* at 765.

Defendants were entitled to rely upon the findings of the HUD Report, even if HUD were wrong. *Fuentes*, 32 F.3d

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6. The District Court referred to Title VII at App. 9a because the legal elements of causes of action under § 1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) are the same. *Hicks v. Arthur*, 878 F. Supp. 737, 738 (E.D. Pa.), *aff'd*, 72 F.3d 122 (3d Cir. 1995).

at 765. Significantly, however, Defendants did *not* rely solely upon the HUD Audit Report, but also conducted their own independent investigation prior to Plaintiff's termination, and provided him with two days of grievance hearings at his request.

After Defendants submitted clear, specific evidence regarding the legitimate, non-retaliatory reasons for Plaintiff's termination, the burden shifted to Plaintiff to show those reasons were pretextual. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Plaintiff had to show that Defendants were motivated by an improper, discriminatory, retaliatory motive in terminating him. He failed to present any such evidence, and he failed to even proffer any at trial.

Plaintiff never testified, and neither submitted nor proffered any other evidence, that the actions about which he allegedly protested or even his termination had anything at all to do with race. 5/22/02 Tr. at 2-150; 5/23/02 Tr. at 2-182; 5/24/02 Tr. at 2-65. Rather, he testified that Defendants had generalized management issues concerning the MDHS. None of this had anything to do with race. The Defendant Commissioners all testified that their reasons for termination included, *inter alia*, the HUD Audit Report and their own investigation of Plaintiff's mismanagement, conflicts of interest, misconduct and nondisclosures in violation of County, State and Federal regulations.

3. The Excluded Areas Of Testimony From The Former Commissioner Defendants Were Not Relevant To Plaintiff's Claim And Any Probative Value Was Outweighed By Their Prejudicial Effect.

Plaintiff's Petition identifies certain discrete areas of testimony that were precluded during the trial by three witnesses, Defendants Mario Mele, Richard Buckman, and Joseph Hoeffel.

Plaintiff's asserted "protected activity" — personal complaints and grievances — is not protected activity, and accordingly, could not support a *prima facie* claim for retaliatory discharge. *Connick v. Myers*, 461 U.S. 138, 147 (1983). It is not enough to show nonspecific complaints about unfair treatment. *Walden*, 126 F.3d at 512 n.4; *L.B. Foster Co.*, 123 F.3d at 754-55; *Barber*, 68 F.3d at 702. General grievances about working conditions simply do not constitute protected activity. *Barber*, 68 F.3d at 702. Any proffered evidence must be connected in time with Plaintiff's termination. *EEOC v. U.S. Steel*, 649 F. Supp. 964, 967 (W.D. Pa. 1986). Accordingly, the following areas of testimony were properly precluded during the trial.

(a) Mario Mele

Plaintiff argues that testimony was precluded by former Commissioner Mele concerning: (1) a 1992 disciplinary action against a former Montgomery County employee; (2) a political event called the Horse Thieves Luncheon at which Plaintiff's counsel claimed some unidentified person told sexual jokes; (3) the suspension of a former assistant county solicitor who was not escorted from his office and about whom the Commissioners refused to comment to the press; and (4) the political fund raising activity of elected officials. None of these areas are admissible, and all are highly prejudicial to Defendants.

In 1992, four years before Plaintiff was terminated, a non-supervisory employee of the public works department, was reprimanded and suspended without pay for allegedly making a racial slur. Montgomery County had different Commissioners in 1992 than it did in 1996, when Plaintiff was terminated. Indeed, Plaintiff's Complaint alleges that "the campaign to remove Plaintiff began in December 1993 . . ." (Complaint, ¶ 21.) Thus, the 1992 disciplinary action against a non-policy making employee was remote in time, and clearly unconnected to Plaintiff's termination in 1996. Moreover, contrary to Plaintiff's Petition, the Court *permitted* Plaintiff to examine Mr. Mele concerning this incident at trial. 5/29/02 Tr. at 105-108.

Also contrary to Plaintiff's Petition, the Court *permitted* Plaintiff to examine Mr. Mele concerning the Horse Thieves Luncheon. 5/28/02 Tr. at 128-130. The trial record directly contradicts Plaintiff's mischaracterization of that event. Mr. Mele's testimony was that there were no racial remarks at the luncheon, and no references to Plaintiff. This testimony was not relevant, but was nevertheless permitted.

The suspension of the former assistant county solicitor occurred at least six months **after** Plaintiff was suspended, and is not relevant. 5/28/02 Tr. at 152-154. It was a purely personnel matter, and did not involve a federal audit of publicly funded community programs.

Contrary to Plaintiff's Petition, the Court *permitted* Plaintiff to examine Mr. Mele concerning campaign fundraising. 5/28/02 Tr. at 143-146. In Pennsylvania, political fund raising is permitted by law for elected officials. There was no proffer that funds were not appropriately raised or reported pursuant to Pennsylvania Election Law. Unlike Commissioner Mele, Plaintiff is not an elected official, and is subject to different laws and regulations than elected

officials. Plaintiff never alleged that any elected officials violated any disclosure laws.

(b) Richard Buckman

Plaintiff argues that testimony was precluded by former Commissioner Buckman concerning his purchase of an interest in a skiing facility called Spring Mountain. However, the Court *permitted* the examination. 5/30/02 Tr. at 132-134. Mr. Buckman testified that he acquired his interest ***after*** his term as a County Commissioner. This acquisition was irrelevant, but was nevertheless permitted by the Trial Court.

(c) Joseph Hoeffel

Plaintiff argues that testimony was precluded by former Commissioner Hoeffel concerning whether his former law firm received fees some time after the Justice for Victims of Terror Act was passed ***in October 2000***, concerning a judgment by a former hostage against Iran. However, Plaintiff never made any such proffer at trial concerning Mr. Hoeffel's former law firm. *See* 5/30/02 Tr. at 156-213; 5/31/02 Tr. at 1-108. ***The first time in this litigation*** that Plaintiff ever identified this alleged issue was in his Post-Trial Brief, and it has even changed significantly since then. Moreover, any such proffer would have had to have been rejected because, *inter alia*, in October 2000, four and a half years after Plaintiff's termination, neither Plaintiff nor Mr. Hoeffel were Montgomery County employees. This is another irrelevant allegation improperly and belatedly raised by Plaintiff.

4. Plaintiff Was Properly Precluded From Calling The Proffered Witnesses.

Plaintiff proffered three witnesses at trial who were precluded, Jon Fox, Harry Massele and Dr. Mash. Plaintiff did not raise the preclusion of Jon Fox in his Motion for a New Trial (Dkt.#286). Plaintiff's Appellant's Brief and Petition for Certiorari only raise Jon Fox, and do not mention Harry Massele or Dr. Mash. Therefore, Plaintiff waived any claim of error concerning all three witnesses. *Keiser v. Matamoras Cmty. Church*, 66 Fed. Appx. 358, 360, 2003 WL 21000922, *2 (3d Cir. May 05, 2003). Nevertheless, in an abundance of caution, Respondents address the proffer of Jon Fox. Additionally, because Plaintiff's Petition also inexplicably refers to a discovery sanction in excluding the testimony of an unidentified expert witness, Respondents address Dr. Mash, even though he was proffered as a fact witness.

(a) Jon Fox

On appeal, Plaintiff asserted that Jon Fox, who lost a bitterly fought United States Congressional election to Defendant Hoeffel, would: (1) corroborate Plaintiff's testimony that Defendant Hoeffel had a "vendetta" against Plaintiff; and (2) contradict Defendant Mele's testimony concerning the political event called the "Horse Thieves Luncheon."[7] Neither are relevant. Plaintiff was an at-will employee. A personal "vendetta," without any proffered *racial* motivation, is irrelevant. *Connick*, 461 U.S. at 147. Even if some unidentified person told a joke at a political event attended by a County Commissioner, no such statement

7. Curiously, Plaintiff's Petition argues at page 5 that he was prevented from examining Commissioner Mele concerning the Horse Thieves Luncheon, and then admits at page 7 that the Court did allow this testimony.

can be attributed to Defendants. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 122 (1988).

However, that proposed testimony is not what Plaintiff proffered at trial. Plaintiff's proffer at trial was that former Congressman Fox would:

> testify with regard to the comments made by Joseph Hoeffel *which were critical* of Mr. Wright, and the — his descriptions of the mistreatment ***that the department*** and Mr. Wright received from Mr. Hoeffel, that those criticisms were made publicly, and also as a Commissioner with regard to one point they raised concerning time. They're not obligated to clock in et cetera, and in the concerns that were raised through the review by Buckman and also later by HUD were during the period of time in which he was a Commissioner.

5/31/02 Tr. at 110 (emphasis added).

This proffer was not relevant, and nothing in it was even in dispute. Commissioner Hoeffel readily admitted publicly criticizing Mr. Wright's mismanagement of the MDHS. The HUD Audit did the same thing. It is a public document from a public agency concerning another public agency's management of public funds.

Mr. Fox was ***not*** a Commissioner during the HUD Audit or Plaintiff's suspension and termination. He was elected to Congress in November 1994, and Commissioner Buckman was appointed to complete his term. The HUD Audit began in February 1995. Mr. Fox never reviewed the HUD findings; did not participate in the County's internal investigation; did not participate in the Salary Board's decision to suspend or terminate Plaintiff; and did not participate in the Grievance Hearing.

Mr. Fox could not possibly testify concerning anything related to Plaintiff's termination. For the same reasons, he could not testify concerning the work day requirements set forth in the Montgomery County Handbook, which was revised in December 1994 and April 1995, after Mr. Fox was no longer a Commissioner.

(b) Dr. Mash

Plaintiff's Petition inexplicably states at page 11 that the District Court entered a "discovery sanction" concerning Plaintiff's expert testimony. To the contrary, the Court did not issue any such "discovery sanction." The only Order (Dkt.#229) to which Plaintiff could refer is omitted from Petitioner's Appendix.

At trial, Plaintiff proffered that Dr. Mash treated Plaintiff for rising blood pressure since 1992, long before his termination in 1996. Plaintiff's Pretrial Memorandum proffered Dr. Mash's testimony as "medical treatment . . . due to stress and racial tension during his employment." However, Plaintiff never submitted an expert report. Nor did he ever identify any expert witnesses.

The Federal Rules of Civil Procedure require advance identification of an expert and the disclosure of an expert report. FED. R. CIV. P. 26(a)(2)(B). Therefore, Dr. Mash was required to be precluded as beyond the scope permitted by a fact witness. The Court properly ruled *in limine* that any treating physicians would be limited to damage testimony, and barred from testifying to any expert opinion.

However, at trial, there was also no valid or reliable basis for speculative damages assumptions, and no basis which satisfied FED. R. EVID. 702, 701 and the principles of *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

On the trial record, any statements offered by Plaintiff's treating physician would be inadmissible expert opinions. *See* Dkt.#270.

Therefore, the District Court properly prevented Plaintiff's attempt to circumvent its May 20, 2002 Order, Federal Rule of Civil Procedure 26 and the Federal Rules of Evidence by offering Dr. Mash as a fact witnesses, but then examining him on matters properly left to an expert witness. Improper "lay" expert opinions are irrelevant since they are not expert opinions, and are unduly prejudicial pursuant to Federal Rule of Evidence 403, since the jury will likely treat them as expert opinion.[8]

Moreover, to the extent that Dr. Mash's testimony was proffered for the purpose of establishing causation, and was based on any information provided to him by Plaintiff, (which would be inadmissible hearsay), rather than on a medical diagnosis of Plaintiff's condition, the evidence was inadmissible. This was particularly applicable here because Plaintiff's medical records recorded similar symptoms and conditions existing long before Plaintiff's termination. No medical records note any causation from Plaintiff's termination. Thus, any such opinion testimony on causation would be based, not on the physician's "perceptions," but on inadmissible hearsay.

Indeed, in his Post-Trial Motion, Plaintiff stated for the first time that Dr. Mash would have testified factually concerning alleged statements made **to him by Plaintiff**. However, these unproffered inadmissible hearsay statements never even happened, and are directly contradicted by the

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8. The tactic of using delayed "lay" opinions to sneak in undisclosed expert opinions has been forcefully rejected by the December 2000 amendments to the Federal Rules of Evidence and the Federal Rules of Civil Procedure. *See Advisory Committee Notes to FED. R. EVID. 701, 2000 Amendments.*

trial record where the District Court directed the parties to read into the record the precise deposition testimony where Dr. Mash testified that Plaintiff never made any statements to him about any emotional or psychological problems, any employment problems, any problems with Defendants, or any racial discrimination or racial bias. 6/3/02 Tr. at 6-7. Accordingly, his proffered and unproffered testimony was irrelevant.

5. Plaintiff Was Not Prejudiced By His Waiver Of Proffers At Trial.

Other than the three witnesses discussed above, Plaintiff did not proffer at trial any of the witnesses identified in his Petition for Certiorari. Nevertheless, in an abundance of caution, Respondents address the belated *post-trial proffers* of these witnesses.

Plaintiff clearly cannot establish that the exclusion of these witnesses, whom he never intended on calling at trial, prejudiced his case. Even if Plaintiff had proffered any of these witnesses at trial, their testimony could not be attributed to Defendants, would have been irrelevant, and would have been highly prejudicial. None of them had any involvement with Plaintiff's termination, and many of them were not even employees of Montgomery County. Alleged stray remarks by employees not involved in a discharge decision cannot provide a basis for charging other employees with discrimination. *Gomez v. Allegheny Health Servs., Inc.*, 71 F.3d 1079, 1085 (3d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996); *Ezold v. Wolf, Block, Schorr and Solis-Cohen*, 983 F.2d 509, 545 (3d Cir. 1992). Every witness listed in Plaintiff's Petition did not have the authority to bind the Commissioners in any matter relating to this case, and had no involvement in the suspension or termination proceeding.

Additionally, evidence of alleged random, isolated, remote and irrelevant events must be precluded under Federal Rule of Evidence 403 because their probative value is outweighed by the danger of unfair prejudice and jury confusion. FED. R. EVID. 403. *See also Coleman*, 306 F.3d at 1347; *National Freight v. S.E. Pa. Transp. Auth.*, 698 F. Supp. 74, 77 (E.D. Pa. 1988), *aff'd*, 872 F.2d 413 (3d Cir. 1989). Its admission would have required Defendants to present substantial counter evidence and would have created several trials within this trial. The District Court therefore properly exercised its discretion in *preliminarily* precluding it.

(a) "The suspended assistant county solicitor"

Plaintiff's belated post-trial proffer of a former assistant solicitor is specious because he failed to serve him with a trial subpoena, and failed to make any proffer concerning his testimony at trial.[9] The testimony would also have been irrelevant and prejudicial. The suspension of this former assistant county solicitor occurred at least six months *after* Plaintiff was suspended and is not relevant to Plaintiff. He was an *assistant* county solicitor, not a department head; his department was not being audited by the federal government; his alleged misconduct did not relate to misrepresentations and nondisclosures; he had not threatened individuals; and millions of dollars of public funds were not in jeopardy. The employment action taken is incomparable and irrelevant to Plaintiff's termination.

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9. Plaintiff's trial subpoenas are attached to Plaintiff's August 27, 2002 Reply To Defendants' Response In Opposition To Motion For A New Trial (Dkt.#288). For many of the witnesses identified in Plaintiff's Petition, the trial subpoenas simply do not exist or do not have affidavits of service.

(b) The "son of the Clerk of Courts"

Plaintiff's belated post-trial proffer is again specious because he failed to serve this witness with trial a subpoena, and failed to make any proffer at trial. The testimony would also have been irrelevant and prejudicial. The employment action taken with respect to a non-supervisory employee at the emergency dispatch center, is incomparable and irrelevant to the termination of Plaintiff Wright, who was the Director of the MDHS and annually controlled millions of dollars in federal HUD funds.

(c) The "former county personnel director"

Although Plaintiff failed to subpoena this witness, for purposes of this Petition, Respondents will assume that the witness would have voluntarily testified if called because he testified in a deposition. However, Plaintiff failed to proffer the witness at trial, failed to read any deposition excerpts into the record, and his testimony was wholly irrelevant.

Plaintiff's Complaint alleges that "the campaign to remove Plaintiff **began in December 1993** . . ." (Complaint, ¶ 21.) He was terminated in 1996. However, this witness was the Personnel Director in a different administration between 1984 and January 1992, when he left County employment, and moved to New Jersey. In his deposition, the witness admitted that he has no knowledge and could not testify as to any matters that occurred *after* January 1992, which was almost two (2) years before Plaintiff even alleges any alleged discriminatory conduct by Defendants began, and four (4) years before Plaintiff was suspended and terminated. His testimony was therefore remote in time and irrelevant to Plaintiff's allegations. It would have been highly prejudicial, and clearly had no probative value.

(d) The "head of county security"

The belated post-trial proffer of William Hanebury concerning security procedures is cumulative of undisputed testimony presented by Plaintiff and of the Defendant Commissioners. Plaintiff testified at length that he was escorted from his office by security and that certain other suspended employees were not.

(e) The MDHS Staff

The belated post-trial proffer concerning the duties of MDHS staff members are redundant to the extensive testimony presented by Plaintiff concerning them. Assuming *arguendo*, that any one of them would have disputed all or part of the HUD Audit Report, such testimony is also irrelevant. The Defendant Commissioners were entitled to rely upon the findings of the federal government and, in fact, were duty-bound to respond. They also conducted an internal investigation that confirmed HUD's findings, and uncovered substantial additional misconduct. Even if HUD had been completely wrong, and even if the internal investigation had been completely wrong, "the plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent." *Fuentes*, 32 F.3d at 765.

(f) The "Two Black employees"

Plaintiff's belated post-trial proffers of two former Montgomery County EEO officers are specious because he never subpoenaed either of them, and failed to make any proffer concerning their trial testimony. Ms. Smith retired to Arizona years ago and is beyond the subpoena power of the Trial Court. Plaintiff also never sought her trial deposition

or her deposition in discovery. Contrary to Plaintiff's Petition, the Court did not even *preliminarily* preclude Mr. Payne. (App. 15a.) Mr. Payne also left County employment years ago. Significantly, Plaintiff took Mr. Payne's deposition and could have read excerpts into the record at trial, but elected not to do so because the testimony was not helpful to his case.

(g) The former County Sheriff

Plaintiff's belated post-trial proffer is specious because he failed to serve this witness with a trial subpoena, and failed to make any such proffer at trial. The former County Sheriff was an elected official and therefore subject to public laws outside of the Montgomery County Handbook. He allegedly made a remark to a reporter in the Spring of 1998, two years *after* Plaintiff's termination, when he was clearly acting outside the scope of his employment, and as campaign manager for a Congressional candidate. The reporter has since published a retraction. This alleged statement cannot be attributable to any of the Defendants, and is wholly irrelevant to Plaintiff's claim. *Gomez*, 71 F.3d at 1085.

(h) Michael Marino

Plaintiff did not proffer Michael Marino at trial. Plaintiff's belated proffer of Mr. Marino has changed substantially since it was ***first*** made in Plaintiff's ***post-trial*** Motion. In his Motion for a New Trial, Plaintiff proffered that Mr. Marino would have testified concerning (1) a meeting with the County Commissioners while he was the District Attorney and (2) the appointment of certain County officials *in the Summer of 2002 after this trial concluded.* (Dkt.#s 286, 288.)

Testimony about the purported meeting would have been cumulative because Montgomery County Chief of Detectives Oscar Vance and Plaintiff both testified at trial about it. That testimony was wholly irrelevant to this case, and did not substantiate Plaintiff's proffer concerning the issue. Any further testimony by Mr. Marino would have been redundantly irrelevant. Plaintiff also had the opportunity to cross examine Messrs. Mele, Buckman and Hoeffel concerning any meeting with either Chief Vance or Mr. Marino concerning this issue, but chose not to do so.

Plaintiff's ***post-trial proffer*** of testimony concerning the County's ***August 2002*** appointment of a new County Solicitor, and in ***June 2002*** of a new Director of Health Services has no relevance to Plaintiff's termination over six years earlier in 1996 by different Commissioners. Plaintiff's claim that the Court erred in excluding evidence of something that, not only was not proffered, ***but had not yet even happened as of the time of trial in May 2002***, is specious.

Similarly, Plaintiff proffers *for the first time on appeal* that another elected official, the current District Attorney, hired Mr. Marino's son as a detective in September 2002, ***which was even after Plaintiff filed his post trial Motion and Supplemental Post Trial Motion.*** His proffers for the first time on appeal concerning alleged events that occurred *after* this trial are disingenuous.

6. Plaintiff Is Not Entitled To A New Trial

Plaintiff's appeal is based exclusively on the purported "blanket" preclusion of evidence more fully briefed *supra*. As set forth above, Plaintiff has not demonstrated how he was prejudiced so as to require a new trial.

(a) Plaintiff Failed To Submit Sufficient Evidence To Establish A *Prima Facie* Case Under § 1981.

Plaintiff was required to prove the *prima facie* elements: (1) that he engaged in protected activity; (2) that Montgomery County took adverse action against him; and (3) that a causal link exists between the protected activity and the discharge. *Texas Dept. of Comm. Affairs v. Burdine*, 450 U.S. 248 (1981); *Quiroga v. Hasbro, Inc.*, 934 F.2d 497 (3d Cir.), *cert. denied*, 502 U.S. 940 (1991). Plaintiff was required to show that Defendants retaliated against him and that his race had a determinative effect on the outcome of that process. *Hazen Paper v. Higgins*, 507 U.S. 604, 610 (1993); *Aguiar v. Morgan Corp.*, 27 Fed. Appx. 110, 112, 2002 WL 90980, *1 (3d Cir. Jan 23, 2002).

Plaintiff never testified, and submitted no other evidence, that the actions about which he protested had anything at all to do with race. 5/22/02 Tr. at 2-150; 5/23/02 Tr. at 2-182; 5/24/02 Tr. at 2-65. Rather, he testified that he submitted generalized management issues concerning the MDHS. As set forth above, it is not enough to show nonspecific complaints about unfair treatment. *Walden*, 126 F.3d at 512 n.4. Plaintiff never raised the issue of race to Defendants, and they never received any complaints from Plaintiff regarding racial discrimination.

Additionally, Plaintiff failed to present any evidence of any causal link between his pre-trial claims of alleged protests and his suspension and termination. Indeed, the evidence of record is overwhelming that Mr. Wright's termination was because of the HUD Audit Report and the internal investigation. No reasonable jury could find that, but for Plaintiff's protesting against his own alleged mistreatment for being a member of a racial minority, he would not have been terminated. *Fuentes*, 32 F.3d at 764.

(b) Plaintiff Submitted No Evidence That Defendants' Proffered Reasons For His Termination Were Pretextual.

Defendants were entitled to rely upon HUD's findings. *Fuentes*, 32 F.3d at 765. After Defendants submitted clear, specific evidence regarding the legitimate non-retaliatory reasons for Plaintiff's termination, the burden shifted to Plaintiff to show those reasons were pretexts. *McDonnell Douglas*, 411 U.S. at 802. Plaintiff failed to submit sufficient evidence from which the jury could reasonably believe that the reasons for suspension and termination were pretextual. *Simpson v. Kay Jewelers*, 142 F.3d 639, 644 (3d Cir. 1998).

Plaintiff also failed to produce evidence showing "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" in Defendants' stated legitimate non-retaliatory reasons, or any evidence which would allow a reasonable jury to find that retaliation for complaints about race was a determinative factor in his termination. *Johnson v. Resources for Human Development*, 878 F. Supp. 35, 38 (E.D. Pa. 1995), *aff'd*, 77 F.3d 462 (3d Cir. 1996). *See also Keller v. Orix Credit Alliance, Inc.*, 130 F.3d 1101 (3d Cir. 1997); *Ezold*, 983 F.2d 509.

(c) Plaintiff Failed To Show That A Majority Of The Salary Board Acted With An Improper Motive.

The Salary Board consists of the three County Commissioners and the Controller. 16 P.S. § 4822. Only the Salary Board can terminate a County employee. 16 P.S. § 4820. Montgomery County can only act through a majority of its Salary Board, which requires three (3) out of four (4) votes. 16 P.S. §§ 4822, 4825(c).

Plaintiff was required to prove that a majority of the four person Salary Board was motivated by racial animus. *City of St. Louis*, 485 U.S. at 123; *LaVerdure v. Montgomery County*, 324 F.3d 123, 125 (3d Cir. 2003). Plaintiff failed to produce *any* evidence that *any* member acted in retaliation against Plaintiff for *any* reason. He never even *testified* that *any* of the four members of the Salary Board were racially motivated. He specifically admitted that Commissioner Buckman did not possess any racial animus. 5/22/01 Tr. at 121. He also never asserted any allegations against the fourth member of the Salary Board, Controller Richard Sundheim. Therefore, Plaintiff failed to prove that a majority of the Salary Board possessed any racial animus.

CONCLUSION

For the forgoing reasons, Plaintiff's Petition for Certiorari must be denied. The jury verdict, the District Court's post-trial decisions, and the decision of the Circuit Court of Appeals must be affirmed. The trial record is overwhelming that Defendants acted properly in terminating Plaintiff.

The United States Court of Appeals for the Third Circuit "reviewed this matter and . . . examined the district court's comprehensive series of orders and dispositions" and concluded that "it is very clear to us that the district court was very diligent in its management of this case and, exercising the appropriate standards of review, we find no error in its numerous dispositions." (4a.) This holding is not in conflict with any decision of a different panel of *any* Circuit Court.

Respectfully submitted,

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